

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Rachel Ellman	Team: Squad #13	CCRB Case #: 201605058	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Friday, 06/03/2016 7:40 PM	Location of Incident: Springfield Boulevard and 146th Avenue	Precinct: 105	18 Mo. SOL 12/3/2017	EO SOL 12/3/2017	
Date/Time CV Reported Mon, 06/13/2016 10:49 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 06/13/2016 10:49 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Vicente Vivar	06025	949775	105 PCT
2. POM Richard Tarver	23842	943860	105 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Richard Tarver	Abuse: PO Richard Tarver questioned § 87(2)(b)	
B.POM Vicente Vivar	Abuse: PO Vicente Vivar questioned § 87(2)(b)	
C.POM Vicente Vivar	Abuse: PO Vicente Vivar stopped § 87(2)(b)	
D.POM Vicente Vivar	Abuse: PO Vicente Vivar searched § 87(2)(b)	
E.POM Vicente Vivar	Abuse: PO Vicente Vivar frisked § 87(2)(b)	
F.POM Vicente Vivar	Abuse: PO Vicente Vivar searched the vehicle in which § 87(2)(b) was an occupant.	
§ 87(4-b) § 87(2)(g)		

Case Summary

§ 87(2)(b) filed this complaint on June 13, 2016 via the CCRB's Call Processing System.

On June 3, 2016, at approximately 7:40 pm, § 87(2)(b) stood beside his parked vehicle on Springfield Boulevard and 146th Avenue in Queens and smoked what he said was a tobacco cigarette. As § 87(2)(b) threw the butt of this cigarette on the ground in front of him, PO Vicente Vivar and PO Richard Tarver, both in uniform and of the 105th Precinct, passed by in a marked RMP driven by PO Tarver. Both officers smelled the odor of marijuana, and PO Tarver promptly turned the vehicle around to approach § 87(2)(b).

Upon exiting the vehicle, PO Vivar and PO Tarver approached § 87(2)(b) and questioned him about whether he had been smoking marijuana (**Allegation A, Allegation B**), which § 87(2)(b) denied. PO Vivar and § 87(2)(b) then continued to engage in a back and forth of PO Vivar accusing § 87(2)(b) of smoking marijuana and § 87(2)(b) denying it and stating instead that he was smoking a tobacco cigarette.

PO Vivar then instructed § 87(2)(b) to empty his pockets (**Allegation C, Allegation D**), and stand with his hands atop the roof of his car. § 87(2)(b) did so without hesitation, and removed coins and his car keys from his right pants pocket, house keys and his phone from his left pants pocket, and cash from his back pocket. § 87(2)(b) stood with his hands atop his car, at which point PO Vivar frisked him from head to toe (**Allegation E**); neither officer went inside § 87(2)(b)'s pockets or under his clothing. Following the frisk, PO Vivar asked § 87(2)(b) for his license and identification. PO Vivar then instructed § 87(2)(b) to open the trunk of the vehicle and to present the items inside for PO Vivar's viewing (**Allegation F**).

PO Vivar issued § 87(2)(b) summons #§ 87(2)(b) for a § 87(2)(b) (Board Review 01)

Mediation, Civil and Criminal Histories

- Mediation was presented to § 87(2)(b) during his interview at the CCRB on June 15, 2016. He refused mediation § 87(2)(b)
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Civilian and Officer CCRB Histories

- This is § 87(2)(b)'s first CCRB complaint. (Board Review 04)
- This is the first complaint filed against PO Vivar in his six year tenure at the NYPD. (Board Review 05)
- PO Tarver has had nine other allegations of misconduct in five CCRB cases. In 201007008, PO Tarver was exonerated for a pointed gun allegation and received instructions for the search of a person. In 201510644, the CCRB recommended

command discipline for PO Tarver for threatening force; the NYPD has yet to come to a disposition on this case. (Board Review 06)

Findings and Recommendations

Allegation A—PO Vicente Vivar questioned § 87(2)(b)

Allegation B—PO Richard Tarver questioned § 87(2)(b)

It is undisputed that PO Vivar and PO Tarver questioned § 87(2)(b) § 87(2)(g)

§ 87(2)(b) stated that he had been on Springfield Boulevard smoking a Marlboro Red cigarette for approximately two minutes when a marked police vehicle drove past as § 87(2)(b) threw the butt of his cigarette on the ground. Shortly after passing § 87(2)(b) the vehicle completed a U-turn and stopped in front of § 87(2)(b) at which point PO Tarver called out to § 87(2)(b) from inside, saying, “What are you doing here?” § 87(2)(b) responded that he had just finished smoking a cigarette, and was about to leave. PO Vivar responded, “No, you were smoking weed.” PO Tarver and PO Vivar then exited the vehicle and began to question § 87(2)(b) about his marijuana use. § 87(2)(b) maintained that he neither possessed nor consumed marijuana. (Board Review 02)

PO Vivar stated that while driving southbound on Springfield Boulevard as PO Tarver’s passenger, he saw § 87(2)(b) standing on the sidewalk with a cigarette in his right hand and smelled the odor of marijuana; PO Vivar did specify that he believed this cigarette to be a marijuana cigarette. § 87(2)(b) stood alone on the street in front of a black sedan that PO Vivar presumed to be § 87(2)(b)s, which was the only car on the street. At the time, the police vehicle was approximately 20 feet from § 87(2)(b) travelling at approximately 20 MPH and with its windows at least partially down. After driving past § 87(2)(b) § 87(2)(b) threw the cigarette onto the ground as PO Tarver made a U-turn and drove toward § 87(2)(b) PO Vivar stated that the odor of marijuana increased upon the officers’ exit of the RMP, and that § 87(2)(b) opened his trunk and began to rifle through it as the officers walked toward him. Upon approach, PO Vivar questioned § 87(2)(b) about marijuana consumption and possession. (Board Review 07)

PO Tarver stated that while driving at approximately 20 MPH on Springfield Boulevard, he saw § 87(2)(b) standing approximately 20 feet away. § 87(2)(b) stood beside his car and held a small unknown object in his hand. Shortly after seeing § 87(2)(b) PO Tarver began to smell the odor of marijuana. PO Tarver then turned the vehicle around to approach § 87(2)(b) and investigate the marijuana odor. PO Tarver did not see § 87(2)(b) throw the small object onto the ground. (Board Review 08)

The property voucher related to this summons indicates that one cigarette with positively field-tested marijuana was recovered from the scene, and is indicated as belonging to § 87(2)(b) (Board Review 09)

Per *People v De Bour*, 40 N.Y.2d 210, 223, (1976): Common-law inquiry must be supported by a founded suspicion that criminality is afoot. (Board Review 10)

Per *People v. Brukner*, 2015 N.Y. Slip Op 25434 (City Ct. 2015): The mere odor of burnt marijuana permits a level-two common-law right of inquiry. In order to elevate the common law right of inquiry to the level three right to forcibly stop and detain, the police must obtain additional information or make additional observations of suspicious conduct sufficient to provide reasonable suspicion of criminal behavior. (Board Review 12)

§ 87(2)(g)

§ 87(2)(g)

Allegation C—PO Vicente Vivar stopped § 87(2)(b)

Allegation D—PO Vicente Vivar searched § 87(2)(b)

Allegation E—PO Vicente Vivar frisked § 87(2)(b)

It is undisputed that PO Vivar frisked the exterior of § 87(2)(b)'s pockets and escalated the circumstance to a stop § 87(2)(g)

§ 87(2)(b) stated that the officers asked him if he had been smoking marijuana, and he informed them that he had not. He told the officers that he was smoking a Marlboro Red cigarette prior to going home for the evening, to which the officers told him to stop lying, and asked if he could identify the butt of his cigarette on the ground so that it could be analyzed. The butt could not be located, and § 87(2)(b) continued to insist that he did not smoke marijuana, and as proof presented the officers with the Marlboro Red pack. PO Vivar then instructed § 87(2)(b) to empty his pockets, and stand with his hands atop the roof of his car. § 87(2)(b) did so without hesitation, and removed coins and his car keys from his right pants pocket, house keys and his phone from his left pants pocket, and cash from his back pocket. § 87(2)(b) stood with his hands atop his car, at which point PO Vivar frisked him from head to toe; neither officer went inside § 87(2)(b)'s pockets or under his clothing.

PO Vivar stated that he asked § 87(2)(b) if he had been smoking marijuana, to which § 87(2)(b) responded that he had not been smoking marijuana or a cigarette of any form. PO Vivar and § 87(2)(b) continued this exchange of accusation and denial, during which PO Vivar stated that he observed § 87(2)(b) briefly put his hands in his pockets. § 87(2)(b) had not been asked for identification or told to retrieve anything from his pockets, and he immediately complied when told to take his hands out of his pockets. After § 87(2)(b) removed his hands from his pocket, PO Vivar frisked § 87(2)(b)'s pockets “for [his] safety” and stated that he smelled marijuana emanating from § 87(2)(b)'s pockets; he had not seen the outline of any objects in § 87(2)(b)'s pockets and could not cite any reasons § 87(2)(b) caused him to fear for his safety. PO Vivar patted § 87(2)(b) atop his pants pockets and did not feel any objects.

While approaching § 87(2)(b) PO Tarver saw him looking into his trunk and appearing to be moving objects around. Upon approach, § 87(2)(b) backed away from his trunk, and turned toward the officers; PO Tarver did not suspect anything in regards to § 87(2)(b)'s trunk. PO Vivar asked § 87(2)(b) if he had been smoking marijuana and if he had any marijuana in his possession, which § 87(2)(b) denied; this exchange continued for two minutes, during which § 87(2)(b) explained that he was an Uber driver taking a break from working. PO Tarver stated that within this conversation, PO Vivar frisked atop § 87(2)(b)'s pants pocket. PO Vivar did not discuss the frisk beforehand with PO Tarver, and PO Tarver stated that he believed PO Vivar was in pursuit of marijuana. PO Tarver stated that he had not seen the outline of any objects in § 87(2)(b)'s pockets, nor did he see § 87(2)(b) put his hands in his pockets; at that time, § 87(2)(b)'s slurred speech suggested to PO Tarver that § 87(2)(b) had used marijuana, yet no aspects of the interaction or § 87(2)(b)'s demeanor suggested that he might have a weapon.

Per *People v. Brukner*, 2015 N.Y. Slip Op 25434 (City Ct. 2015): The mere odor of burnt marijuana permits a level-two common-law right of inquiry. In order to elevate the common law right of inquiry to the level three right to forcibly stop and detain, the police must obtain additional information or make additional observations of suspicious conduct sufficient to provide reasonable suspicion of criminal behavior. (Board Review 12)

Per *People v. Lipscomb*, 179 A.D.2d 1043, 579 N.Y.S.2d 302 (App. Div. 1992): An officer asking a suspect to empty his pockets is the equivalent of searching his pockets themselves. (Board Review 13)

Per *People v. DeBour*, 40 N.Y.2d 201 (1976): An officer must have reasonable suspicion that he/she is in danger by virtue of the individual being armed in order to frisk that individual. (Board Review 10)

Per *People v. Marsh*, 20 N.Y.2d 98 (1976): A protective frisk should not be extended beyond its purpose of securing the safety of the officer. (Board Review 14)

§ 87(2)(g)
[REDACTED]

§ 87(2)(g)
[REDACTED]

§ 87(2)(g)

§ 87(2)(g)

Allegation E—PO Vicente Vivar searched the vehicle in which § 87(2)(b) was an occupant.

§ 87(2)(b) testified that after the frisk, PO Vivar instructed him to open the trunk of his car, which he did compliantly. § 87(2)(b) stated that there were two bags in the trunk, and that PO Vivar instructed him to open each bag and display it so that PO Vivar could see inside without broaching the plane of the trunk. § 87(2)(b) stated that PO Vivar insisted that he smelled of marijuana, yet did not say that § 87(2)(b)'s car smelled of marijuana.

PO Vivar stated that § 87(2)(b)'s trunk remained open throughout the stop, but that he did not search the vehicle nor did he ask § 87(2)(b) to see anything inside it.

PO Tarver stated that § 87(2)(b)'s trunk remained open throughout the incident. PO Tarver stated that he never searched inside the trunk, and that he did not have reason to, as from the exterior he was able to see that the trunk was empty. PO Tarver did not see PO Vivar search inside § 87(2)(b)'s vehicle, and stated that neither he nor PO Vivar at any point asked § 87(2)(b) to retrieve items from his trunk.

§ 87(2)(g)

§ 87(4-b) § 87(2)(g)

Squad: 13

Investigator:	_____	_____	_____
	Signature	Print	Date

Squad Leader:	_____	_____	_____
	Title/Signature	Print	Date

Reviewer:	_____	_____	_____
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